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EXAMINER

CORBIN, ARTHUR L

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/695,833
Filing Date: October 30, 2003
Appellant(s): SOLDANI, CRISTIANA

Robert Barrett
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed June 4, 2008 appealing from the Office
action mailed January 8, 2008

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

11/314,042

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

2001	EP 1 151 673 A2	RIVIER	11-
1979	4,154,867	ALDRICH ET AL	5-
1973	3,738,845	LIEBRAND	6-

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim 3 stands rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. There is no antecedent basis in claim 1 for “the cooking step” (claim 3, line 2) since no positive cooking step is recited in claim 1. Without such a positive cooking step there can be no evaporator as claimed in claim 3.

Claims 1, 3, 5, 6 and 8-12 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Rivier (EP 1 151 673 A2, cols. 13, 14 and 17-19). Rivier discloses preparing a confectionery product from a starting liquid composition including water, citric acid and sorbitol, maltitol, isomalt or a mixture of these polyols. The composition is cooked at 130 C under vacuum conditions and then cooled to form a plastic mass which is subsequently filled with a center filling. It would have been obvious that the cooking in Rivier evaporates water from the composition without causing significant hydrolysis of the polyol since said cooking is performed at a temperature as claimed by appellant. Further, finding the optimum water content and acid content of the

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confectionery product (claims 1, 11, 12) would require nothing more than routine experimentation by one reasonably skilled in this art. The use of a vacuum evaporator to apply a vacuum (claim 4) and multi-stage cooking (claims 5 and 6) are conventional in this art and in the absence of unexpected results are entitled to no patentable weight.

Claims 1, 3, 5, 6 and 8-12 are also rejected under 35 U.S.C. 103(a) as being unpatentable over Aldrich et al (4,154,867, col. 2) or Liebrand (3,738,845, cols. 1-2) in view of Rivier EP 1 151 673 A2, cols. 13, 14, 17-19). Both primary references disclose preparing sugarless confections by cooking a composition including water, sorbitol and 0.2 % or 0.5 % citric or malic acid. The cooked composition is then cooled to form the final product. It would have been obvious to substitute isomalt or maltitol for the sorbitol in either primary reference and to perform the cooking therein under vacuum and at appellant's claimed temperature since it is well known to use sorbitol, isomalt and maltitol as alternative sweeteners in preparing confectionery products and to cook the confectionery composition under vacuum at a temperature of 130C, as evidenced by Rivier. Further, see the last three sentences in the immediately preceding paragraph.

(10) Response to Argument

Although "a cooking step" is claimed by appellant in claim 1, this is not a step that is part of appellant's invention, but rather a step claimed for comparison purposes. To provide proper antecedent support for the cooking step recited in claim 3, appellant must make it clear that a positive cooking step occurs in claim 1. However, such a limitation is not present in claim 1. Thus, the 35 U.S.C. 112, paragraph 2, rejection set forth above is proper and should be sustained.

Appellant's affidavit submitted April 8, 2008, as well as all of appellant's arguments submitted in the brief on appeal, have been fully considered but they are deemed not persuasive. Appellant's primary concern with regard to Rivier is that it discloses adding the acidic component after cooking rather than before cooking thereby teaching away from appellant's step of adding the acid prior to cooking. Appellant's contention in this regard is without merit as Rivier clearly discloses the presence of an acid before cooking of the liquid composition therein at 130 C (col. 13, lines 45-55 and col. 14, lines 28-33). The acid is added as an active ingredient with a polyhydric alcohol in preparing the slurry composition of the casing in Rivier (col. 13, lines 45-55). Subsequently, the polyhydric alcohol containing slurry, which includes the acid according to col. 13, lines 52-55, is dehydrated by cooking at 130 C under vacuum conditions (col. 14, lines 27-39).

Although Aldrich et al and Liebrand fail to disclose appellant's claimed cooking temperature of 145 C or less in order to prevent significant hydrolysis of the sugar alcohol by the acid, as appellant argues, Rivier renders it obvious to cook at such a temperature in the process of either Aldrich et al or Liebrand, as set forth above in the second rejection. Further, Rivier also renders it obvious to use isomalt or maltitol in place of the sorbitol in Aldrich et al as set forth above in said second rejection.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Arthur L Corbin/

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